

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

177264

FILE: B-214873**DATE:** June 25, 1985**MATTER OF:** Colegera L. Mariscalo - Backpay and Travel
Expenses Incident to MSPB Proceeding**DIGEST:**

1. Employee who was carried as absent without leave (AWOL) for period prior to her discharge, and who was ordered reinstated by the MSPB, is not entitled to backpay for the period she was AWOL in the absence of evidence that she was ready, willing and able to work during that period.
2. Employee stationed in Rome, Italy, was transferred to the United States and later discharged for failure to report for duty in the United States. Notwithstanding the MSPB order requiring her reinstatement, she may not be reimbursed for travel from Rome to the United States on the basis of her transfer since she never reported for duty in the United States.
3. The record does not provide an adequate basis for determining the location of the employee's permanent duty station at the time of her discharge. Accordingly, payment for return travel from Rome to the United States cannot be authorized pursuant to paragraph 2-1.5a(a)(b) of the Federal Travel Regulations, FPMR 101-7 (September 1981).
4. Employees who are ordered reinstated may be reimbursed for travel to attend their hearing. However, an employee's travel while in annual leave status, 5 months prior to the hearing, over 2 months prior to the effective date of discharge, and over 3 weeks prior to issuance of a notice of a proposed adverse action cannot be equated with

travel to attend a hearing. Such travel is governed by the rule which applies to travel away from an employee's permanent duty station while on approved leave. Under this rule, the Government is responsible only for the cost of travel from the leave location to the location of the hearing. The claim for travel to the leave location is denied.

Kevin D. Rooney, Assistant Attorney General for Administration, has requested a decision on whether Colegera L. Mariscalo, an employee of the Drug Enforcement Administration (DEA), is entitled to backpay for the period June 15, 1981, through August 7, 1981, and to reimbursement for the cost of her airfare from Rome, Italy, to New York, New York. Based upon the present record, we find that Ms. Mariscalo is not entitled to backpay for the period claimed, and that she is not entitled to reimbursement for the constructive cost of travel from Rome, Italy, to New York, New York.

Ms. Mariscalo was provided with a copy of the agency's submission in this case and given an opportunity to comment. Her attorney, Irving Kator, filed written comments on her behalf.

On August 7, 1981, Ms. Mariscalo was removed from her position as a secretary with the DEA for failure to accept a reassignment to another location. She appealed her removal to the Merit Systems Protection Board (MSPB). On December 9, 1981, the hearing examiner issued a decision finding that the reassignment was a subterfuge for removal and, therefore, not taken for legitimate management reasons. The agency filed a petition for review of the decision of the hearing examiner, and that petition was denied by the MSPB on January 7, 1983. The agency was ordered to cancel the removal.

Ms. Mariscalo was reinstated on March 14, 1983, and has been paid backpay for the period August 7, 1981, the date of her discharge, to the date of her reinstatement. She has requested reimbursement for the two additional items based upon the following facts.

FACTS

Ms. Mariscalo had been employed at the Rome office of the DEA since 1965, and had lived in Italy since 1959. In 1978 and again in 1980 she had been advised that she was being reassigned to another location. She filed grievances under the agency grievance system contesting the proposed transfers, but she was successful only as to the 1978 proposed reassignment. Finally, after dismissal of the second grievance, in early February 1981 while Ms. Mariscalo was on annual leave at her family home in New York, she was directed to report for duty at the DEA Resident Office in Key West, Florida, on March 9, 1981.

Ms. Mariscalo had previously advised DEA that she would not accept reassignment to another location and she did not report for duty at Key West on March 9. Instead, she voluntarily returned to Rome. Through her attorney, Ms. Mariscalo submitted a request for 30 days sick leave, with a note from her doctor in Rome. That request for sick leave was approved. Accordingly, from March 9 to April 7, 1981, Ms. Mariscalo was carried in approved sick leave status, and her reporting date at the Key West Office was changed to April 8, 1981.

She did not report for duty on April 8, 1981, and again submitted a request for sick leave, with a note from her doctor in Rome. That request was approved and Ms. Mariscalo's reporting date was changed to May 7, 1981.

When Ms. Mariscalo did not report to Key West on May 7, the agency contacted her in Rome. Ms. Mariscalo again advised the agency that she did not intend to report to Key West, that she wanted to exhaust her leave and had forwarded a request for annual leave to agency headquarters in Washington, D.C., and that she would await termination. She also advised that she would be returning to New York in June.

The agency approved 192 hours of annual leave and established a new reporting date at the Key West Office of June 15, 1981. On June 2, while on annual leave, Ms. Mariscalo left Rome and returned to her family home in New York.

Ms. Mariscalo did not report for duty in Key West on June 15. A notice of proposed adverse action was issued on June 24, and she was terminated effective August 7, 1981, for failure to accept reassignment. She was carried

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in absent without leave (AWOL) status from June 15 to August 7, 1981.

On August 13, 1981, Ms. Mariscalo's attorney requested that the MSPB hold the hearing in Washington, D.C. There is no evidence in the record to indicate that the agency made an objection to holding the hearing in Washington, D.C., or that the agency requested that the hearing be held at any other location. The record does not show where the agency advised Ms. Mariscalo to file her appeal, as required by 5 C.F.R. § 1201.21(a) (1984). See also, 5 C.F.R. §§ 1201.22(a) and 1201.4(e).

The hearing was held on November 2, 1981, in Washington, D.C., and Ms. Mariscalo traveled from New York to Washington, D.C. to attend. The agency has reimbursed her for her travel from New York to Washington, D.C., and return, on the grounds that an employee is entitled to reimbursement for the cost of travel to testify at an MSPB hearing. Lawrence D. Morderosian, B-156482, June 14, 1977; 33 Comp. Gen. 582 (1954).

Ms. Mariscalo now seeks backpay for the period June 15, through August 7, 1981, prior to her termination, when she was carried in AWOL status. She also seeks reimbursement for her travel from Rome to New York on June 2, 1981.

OPINION

ABSENT WITHOUT LEAVE

The agency denied Ms. Mariscalo's claim for backpay for the period of AWOL because she "voluntarily chose not to report to her new duty station."

Ms. Mariscalo's attorney argues that since the MSPB found her removal to be improper, and since the removal was based upon her refusal to report to Key West, the transfer itself was illegal. Therefore, Ms. Mariscalo was under no legal obligation to report to Key West, and is entitled to her salary for the period she was carried as AWOL. It is argued that the agency had no legal basis for withholding her salary since the loss of salary was due to the illegal act of the agency, and was through no fault of Ms. Mariscalo.

We note that there is nothing in the MSPB decision which addresses Ms. Mariscalo's entitlement to backpay for the period of AWOL. However, even assuming the MSPB's decision could be construed as argued by Ms. Mariscalo's attorney, there is no entitlement to backpay for the period claimed in the circumstances of this case.

There is no entitlement to backpay for periods during which an employee is not ready, willing and able to work. B-160200, April 6, 1967; Ralph C. Harbin, B-201633, April 13, 1983. In this case, Ms. Mariscalo did not report for duty at any location when her leave ended, and did not in any other way demonstrate that she was ready, willing and able to work during the period in question. She was carried in sick leave status at her request from March 9 through May 6, 1981, and then she was carried in annual leave status until June 15, 1984. There is nothing in the record which would establish that her circumstances changed on June 15, and she then became immediately available for work. Accordingly, her claim for backpay is denied.

REIMBURSEMENT FOR TRAVEL

The agency denied Ms. Mariscalo's request for reimbursement for her travel on June 2, 1981, from Rome to the United States on two grounds. First, DEA found that since she did not report for duty at Key West, she is not entitled to the constructive cost of travel from Rome to Key West. The agency relied on Joseph Salm, 58 Comp. Gen. 385 (1979).

Secondly, DEA found that the MSPB could have held the hearing in Rome and, therefore, the agency was not obligated to reimburse her for the constructive cost of travel from Rome to Washington, D.C., to testify at the hearing on her case.

Ms. Mariscalo's attorney argues that our decision in Joseph Salm is distinguishable and cannot properly be relied upon to deny payment in this case. He also disputes the agency's refusal to pay on the basis that the hearing could have been held in Rome. He points out that although DEA states the hearing could have been held in Rome, the hearing was in fact held in Washington, D.C. Moreover, the Washington, D.C. location was favorable to the agency since it is the location of its headquarters.

He argues that it would have cost more to fly MSPB and agency attorneys to Rome than it would have cost to fly Ms. Mariscalo to Washington, D.C.

As a third basis for payment Ms. Mariscalo's attorney relies upon paragraph 2-1.5a(1)(b) of the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTK), which provides that employees separated overseas for purposes of the Government are entitled to reimbursement for return travel to the United States. He argues that, although the agency issued the termination papers from the United States, Ms. Mariscalo was constructively discharged from Rome. Since she was discharged in Rome for purposes of the Government, she is entitled to return travel to the United States as provided at paragraph 2-1.5a(1)(b).

The record in this case is not sufficient to authorize payment of Ms. Mariscalo's travel to the United States under paragraph 2-1.5a(1)(b). Had she chosen to remain in Rome and await the notice of her discharge, and her discharge, there could be some basis for concluding that her termination occurred there, irrespective of the location from which the agency issued the formal notice of discharge.

Instead, for a period of 4 to 5 months, Ms. Mariscalo was carried in a combination of sick and annual leave at her request, and voluntarily traveled from Rome to New York twice. She was AWOL for almost 2 more months. Thus, she had not actually been at work anywhere in the agency for about 7 months prior to her discharge. The record does not indicate the status of her former position in Rome or of her proposed position in Key West during this 7-month period.

Further, neither the decision of the hearing examiner nor the decision of MSPB addresses the issue of whether Ms. Mariscalo was separated from a post of duty outside the conterminous United States. Under these circumstances, and absent a determination from the MSPB that Ms. Mariscalo was discharged from her position in Rome, the record does not provide an adequate basis for determining her entitlements under paragraph 2-1.5a(1)(b). But see, 5 C.F.R. § 1201.181, Robinson v. Department of the Army, MSPB Docket No. SF07528310135 (June 12, 1984); Spezzaferro v. Federal Aviation Administration, MSPB Docket No. BN075281F0717

Comp. (October 25, 1984). Accordingly, we cannot authorize payment on that basis.

Likewise, Ms. Mariscalo's transfer to the Key West office does not provide a basis for payment. We agree with her attorney that the facts in Joseph Salm differ from the facts in this case. Nonetheless, since Ms. Mariscalo did not report for duty in Key West, the transfer to Key West does not provide a basis for payment of her travel on June 2, 1981. There is no authority to pay an employee for travel to a new duty station when the employee refuses to report for duty at the new location.

The remaining argument offered in support of payment for Ms. Mariscalo's travel on June 2 is that she was required to travel to the United States to litigate her removal, and is, therefore, entitled to reimbursement for her trip from Rome to the United States. The agency disputes this, arguing that the MSPB hearing could have been held in Rome.

We point out that there is no entitlement to reimbursement for incidental expenses incurred in connection with litigation over an adverse action, including travel to arrange for representation by an attorney, and travel to confer with an attorney. We have held, however, that an employee who has been ordered reinstated may be reimbursed for travel expenses incurred in connection with travel to attend an MSPB hearing. Lawrence D. Morderosian, B-156482, supra. Cf. Gracie Mittelsted, B-212292, October 12, 1984. The potential application of this rule in the circumstances of this case is complicated by the fact that there were a number of possible locations at which the hearing could have been held. In any event, we find it unnecessary to explore the question of where the hearing could or should have been held since we conclude that the June 2 trip fundamentally does not qualify as travel to attend an MSPB hearing.

As noted above the record does not provide a sufficient basis for determining Ms. Mariscalo's permanent duty station at the time of her discharge. However, the record is clear that when she traveled from Rome to New York on June 2, 1981, Ms. Mariscalo was on annual leave status. Her travel, in fact, occurred 5 months before the hearing on November 2, 1981, over 2 months before the effective date of her discharge on August 7, and over 3 weeks before

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she even received the June 24 notice of a proposed adverse action.

Under those circumstances, her travel on June 2 cannot be viewed as travel to attend the hearing. While the purpose of her travel on June 2 may have been to facilitate litigation over an anticipated discharge, there is no legal authority for payment on that basis. Travel in anticipation of discharge cannot, in these circumstances, be equated with travel to attend a hearing. Accordingly, wherever her permanent duty station was at the time of her discharge in August, her travel on June 2 must be governed by the rule that applies to travel away from the official duty station while on approved annual leave.

The general rule is that when an employee proceeds to a point away from his official duty station while on annual leave, he assumes the obligation of returning at his own expense. If during that leave, or at the expiration of that leave, the employee is required to perform temporary duty at another location prior to returning to his permanent duty station, the Government is chargeable only with the difference between the cost attributable to temporary duty at the other location and what it would have cost the employee to return to his permanent duty station directly from the place where he was on leave. Patricia Stolfa and Devra Bloom, B-189265, September 21, 1977; affirmed December 12, 1978.

Applying this rule to the facts in this case means that Ms. Mariscalo is entitled to reimbursement only for travel from New York to Washington, D.C., and return. Even assuming Rome was her permanent duty station at all times relevant to this issue, she left Rome voluntarily on June 2 while on annual leave. Her trip to Washington, D.C., in November to attend the hearing is comparable to temporary duty travel to a location other than the location of her leave.

The Government is therefore responsible only for the cost of her travel from her leave location to the location of the hearing, i.e., New York to Washington, D.C. and her return trip. Ms. Mariscalo has already been reimbursed for this amount. Her claim for reimbursement for travel from Rome to New York is denied.

Milton J. Forster

Acting Comptroller General
of the United States